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AUG 1 1951
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 216

DELPHI FROSTED FOODS CORPORATION,

Petitioner and Appellant below,

—v.—

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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IN THE

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No. .....

DELPHI FROSTED FOODS CORPORATION,

Petitioner and Appellant below,

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ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petition of Delphi Frosted Foods Corporation respectfully shows as follows:

I

Summary Statement of Matter Involved

This action was instituted in the District Court of the United States for the Western District of Kentucky—Paducah Division and after trial a judgment was rendered

on March 3, 1950 in favor of the respondent dismissing the complaint. The petitioner appealed to the United States Court of Appeals, Sixth Circuit where the judgment was unanimously affirmed by judgment of affirmance entered on May 3, 1951. Opinions were written in both courts, copies of which are attached.

The suit was instituted by Delphi Frosted Foods Corporation against the Illinois Central Railroad Company for recovery of a judgment in the sum of $34,924.48 on account of damage to six cars of frozen fruit shipped out of Paducah, Kentucky, during the month of July, 1945. It involves the liability of Illinois Central Railroad Company, the receiving carrier, under the Carmack Amendment to the Interstate Commerce Act, Title 49, Section 20, par. (11) U. S. C. A., which provides in part as follows:

> "(11) Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby

imposed; * * * Provided further, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice."

The decisions in both lower courts were predicated on two principles of law, which petitioner urges were both erroneously decided.

Of the six cars in question, plaintiff had sold the contents of four of the cars to certain of its customers, while the cars were in transit. When these four cars arrived in a damaged condition, it was plaintiff's customers who filed written notices of claim with the delivering carriers. Subsequently, and by virtue of court decisions in New York State, plaintiff was required to refund all moneys paid to it by its customers on the ground that title had not passed to them. At the trial, the defendant contended that, as to these four cars, the plaintiff had no standing and could not press the claim for damages on the ground that it, the plaintiff, had not filed proofs of claim within the nine months required by the bills of lading.

This, then, created the first of the two principal issues of law that were decided, *i.e.*: has there been a sufficient compliance with the bill of lading requirement of written notice of claim when such written notices have been filed by customers of the consignee named in the bill of lading, or does proper compliance require that the consignee named in the bill of lading file such written notices of claim.

Plaintiff-appellant cited numerous cases holding that the only real purpose of the notice requirement was to afford the carrier an opportunity to investigate the claim, and contended that what had occurred in the instant case was a "substantial compliance" with the requirement of notice, as defined and decided by many cases.

The Trial Court held, and the Court of Appeals affirmed, that there had been no compliance with the requirement of notice, and dismissed the complaint as to these four cars, without touching on the question of the carrier's liability for the damage to these cars.

The second principal issue of law was the decision by both courts below on the question of the carrier's liability as to the other two cars. Both courts held that the measure of the carrier's liability was that of an ordinary bailee. Petitioner did, and does contend that the carrier's liability is that of an insurer, and as such, subjected the carrier to a burden of proof far greater than the proof required of a bailee, in order to be absolved of liability.

II

Reasons Relied on for Allowance of the Writ

1. On the question of the sufficiency of the proofs of claim filed on four cars by customers of the consignee, the decision of the Court of Appeals is in conflict with decisions of this Court and is contrary to the purpose, spirit and intent of the requirement that written notice of claim be given to a carrier within nine months.

2. The decision of the Court of Appeals which holds that the carrier's liability is that of an ordinary bailee is in conflict with decisions of other circuits, and of this court, which hold that a carrier's liability is that of an insurer,

and that in order to be absolved, it must submit proof far greater than that required of an ordinary bailee.

3. The Court of Appeals, in support of its holding that the carrier was liable only as an ordinary bailee, relied on, and cited a decision of this court (Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co., 270 U. S. 416) which is not in point. The cited case was decided at a time when the Carmack Amendment to the Interstate Commerce Act, 49 U. S. C., Section 20, par. 11 read differently from the way it reads now, and at that time it permitted a claimant to bring suit against a carrier even though no written notice of claim was filed with the carrier; in such instance the plaintiff was required to affirmatively prove the negligent act of the carrier, and he could not have the benefit of the presumptions given to him if he had filed a notice of claim. It was under such facts that this court decided in Chesapeake & Ohio Ry. v. Thompson Mfg. Co., 270 U. S. 416, that when the railroad submitted its proof it was subject only to the rule applicable "to all bailees."

4. Both questions are of universal import, affecting every industry and business in the country, and merit consideration of this court, so that the uncertainties and conflicts created by the decisions in the courts below may be resolved.

III

Your petitioner presents to this court, and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case, as the same appears in the United States Court of Appeals, Sixth Circuit.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United

States Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Court of Appeals in the case numbered and entitled on its docket No. 11,193, Delphi Frosted Foods Corporation, Appellant v. Illinois Central Railroad Company, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by the court, and for such further relief as to this court may seem proper.

Dated: New York, N. Y., July 25, 1945

CHARLES GARFINKEL
Attorney for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. .....

DELPHI FROSTED FOODS CORPORATION,

Petitioner and Appellant below,

—v.—

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Court Below

The opinion of the District Court was rendered March 3, 1950 (R. 949). The opinion of the Court of Appeals was rendered April 10, 1951 (Annexed to petition). Official citation is not yet available.

II

Grounds of Jurisidiction of the Supreme Court

1. The judgment to be reviewed is dated May 3, 1951.

2. The statutory provision which is believed to sustain the jurisdiction of the Court is 28 U. S. C. A. 347.

3. The cause of action asserted by petitioner is created by a federal statute, 49 U. S. C., Sec. 20, par. 11, and the principal two questions decided by the Court of Appeals are questions interpreting a federal statute, and both questions have been decided in a way that conflicts with decisions of other circuits and of this court, and in support of its decision on one of the questions, the Court of Appeals cited and relied on a decision of this court which is not in point.

4. Cases which petitioner believes sustain said jurisdiction are:

Reynolds v. *Adams Express Co.*, 248 U. S. 548;
Carr v. *Pennsylvania R. R. Co.*, 243 U. S. 587;
Oregon-Washington R. & Navigation Co. v. *McGinn*, 258 U. S. 409.

III

Statement of the Case

This has already been stated in the preceding petition under I, which is hereby adopted and made part of this brief.

IV

Specification of Errors

1. The Court of Appeals and District Court erred in holding that the filing of claims in writing by petitioner's customers within the required nine months was not a sufficient compliance with the terms of the bill of lading requiring claims to be filed in writing.

2. The Court of Appeals and District Court erred in fixing the measure or yardstick of the liability of the defendant, a common carrier, as that of an ordinary bailee.

V

Questions Presented

1. Has a plaintiff, in an action for damage to property against a common carrier, shown sufficient compliance with the terms of a bill of lading requiring claims to be filed in writing within nine months, when he establishes that claims in writing were filed within such time by certain of his customers, and the receipt of such claims in writing were acknowledged by the carrier?

2. In an action against a common carrier for damage to property while in transit, is the determination of the liability of the common carrier fixed by rules applicable to that of an ordinary bailee, or is the common carrier put to the same proof required of an insurer in order to be absolved of liability?

VI

Summary of Argument

1. The only purpose and intendment of the requirement in the bill of lading that claims in writing be filed within ninety days is to afford a carrier an opportunity to investigate the claim within a reasonable time after its occurrence. The bill of lading does not make any specific requirement as to who shall file such claim in writing. The cases deciding this question hold that it does not matter who files the claim in writing. Therefore, the filing of the claims in writing by certain of the plaintiff's customers has accomplished the purpose of the requirement in that the carrier has been notified within a reasonable time and can investigate the claim, and the filing of such notices in writing are a sufficient compliance with the terms of the bill of lading.

2. The determination as to whether a common carrier is liable for damage to property while in transit is fixed, not by the rule applicable to an ordinary bailee, but rather by the rule applicable to an insurer of property, and the only proof which can absolve it of liability is proof that the damage was caused by one or more of the well-known specified causes, *i.e.*: an act of God, the public enemy, the inherent nature of the merchandise, or the fault of the shipper.

VII

ARGUMENT

POINT I

The purpose for the requirement in the bill of lading that notice (of claim) in writing be filed within ninety days is to afford the carrier an opportunity to investigate the claim. In the case of *Georgia, Fla. & Ala. Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, this court, by Justice Hughes, said:

> "The purpose of the stipulation (requiring notice in writing) is not to escape liability, but to facilitate prompt investigation."

The same rule is stated in 1 A. L. R., page 900, as follows:

> "The fundamental reason for or purpose of a stipulation requiring notice of a claim for damage to a shipment is not to relieve the carrier from just liability; but reasonably to inform it that the shipment has been damaged, and that it is charged with liability therefor, and to give it an opportunity to examine the nature and extent of the injury."

The following are cases which have held that the requirement of notice has been complied with even though the written notice has been filed by someone other than the plaintiff in the action:

Texas & P. Ry. Co. v. *McMillen,* 183 S. W. 773, in which the consignee was permitted to recover even though the notice of claim had been filed solely by the consignor;

Hines v. *Mason,* 221 S. W. 861, which held that written notice given by shipper's attorney was sufficient;

Layton v. *Central of Georgia Ry. Co.,* 149 S. E. 431, which permitted a recovery even though the written notice was given by the factor who sold the goods shipped;

McColter v. *Norfolk Southern R. Co.,* 100 S. E. 326 where recovery was permitted even though the notice of claim was filed by the broker for the shipper.

POINT II

In an action against a common carrier for damage to property while in transit, the plaintiff proves a *prima facie* case when it proves that the property was in good condition when delivered to the carrier, and that it was in a damaged condition when delivered by the carrier at destination. Thereafter, the carrier, in order to be absolved of liability, cannot rest on mere proof that it was free from any act of negligence, which is all that is required of an ordinary bailee, but it must affirmatively prove one or more of the four excepted causes which are required of an insurer.

In Chicago & E. I. R. R. Co. v. *Collins Co.,* 249 U. S. 186, this court said:

"The common law principle making the common carrier an insurer is justified by the purpose to prevent negligence or collusion between dishonest carriers or their servants and thieves or others, to the prejudice of the shipper, who is, of necessity, so remote from the property, when in transit, that proof of such collusion or negligence, when existing, would be difficult if not impossible."

To the same effect are the following cases:

Callister v. *U. S. Shipping Board,* 21 F. (2d) 447;
Singer v. *American Express Co.,* 219 S. W. 662, certiorari denied, 254 U. S. 632;
Produce Co. v. *Thompson* (1950), 228 S. W. 2d 344;
Galveston H. & S. A. Ry. Co. v. *Wallace,* 223 U.S. 481;
Great Atlantic & Pacific Tea Co. v. *Brasaleiro,* 159 F. (2d) 661;
Southern Ry. Co. v. *Pettit,* 257 F. 663;
Bank of Kentucky v. *Adams Express Co.,* 93 U. S. 174.

In *Galveston H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481, the question as to what proof was required of the carrier, after plaintiff proved a *prima facie* case, was squarely presented. The court said:

"The plaintiffs were not obligated both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof. If

the failure was due to the act of God, the public enemy or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof the plaintiffs were entitled to recover, and the judgment is affirmed."

The case of *Chesapeake & Ohio Ry. Co.* v. *Thompson Mfg. Co.*, 270 U. S. 416, is easily distinguishable, and is certainly no authority from this court for a holding that a common carrier is subject only to that degree of proof which is required of an ordinary bailee. In that case the plaintiff brought his action under that section of the Carmack Amendment which (at the time) permitted the bringing of an action even though no written notice of claim had been filed. The statute permitting this cast the burden of proving the actual negligence of the carrier on the plaintiff. Under those facts, this court held that the carrier need only rebut the proof of negligence, and could do so in the same way as an ordinary bailee.

But, in the case at bar, in connection with the two cars of merchandise as to which the filing of written notice of claim was not in issue, plaintiff was not required to, and did not attempt to prove the actual, affirmative negligent act of the carrier, but relied on the *prima facie* presumption in its favor on proof of good condition when delivered to the carrier and damaged condition on arrival. This, then, put the carrier to the burden of proving that the damage was occasioned by one of the "excepted causes," as required by the principle of law enunciated in all of the cases cited above.

CONCLUSION

It is therefore respectfully submitted that
and the two principles of law involved, is c
for the exercise by this Court of its supervis
by granting a writ of certiorari and thereaf
ing and reversing the decision of the Court c

Respectfully submitted,

CHARLES GARFI
Counsel for
160 Broad
New Yo

AUG 30 1951

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1951.

No. 216.

DELPHI FROSTED FOODS CORPORATION,
Petitioner and Appellant Below,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent and Appellee Below.

BRIEF FOR RESPONDENT AND APPELLEE.

JAMES G. WHEELER,
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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

OPINIONS OF COURTS BELOW.

Delphi Frosted Foods Corporation v. Illinois Central R. Co., No. 438 U. S. D. C. W. D. Kentucky, March 3, 1950, 89 F. Supp. 55.

Delphi Frosted Foods Corporation v. Illinois Central R. Co., No. 11,193 U. S. C. A., 6th Circuit, April 10, 1951, 188 F. 2d 343, Advance Sheets Federal Reporter May 28, 1951.

SUBJECT INDEX.

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Counter-Statement of Facts 1

I. Petition for Certiorari Filed August 1, 1951, Not in Time 3

This case was decided by the United States Court of Appeals, Sixth Circuit, April 10, 1951. The time for filing petition for certiorari expired July 10, 1951. The date of the issue of the mandate does not affect right to apply for certiorari.

II. No Notice Given 7

Petitioner was required by the bill of lading to give notice of a claim within 9 months. It failed to plead or prove that it had given such notice. Claims made against the delivering carrier by persons who had contracted to purchase some parts of the shipments, such persons not being agents of the petitioner, and having no title to the goods shipped, were not sufficient.

IN THE

Supreme Court of the United States

October Term, 1951.

No. 216.

DELPHI FROSTED FOODS CORPORATION,
Petitioner and Appellant Below,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent and Appellee Below.

BRIEF FOR RESPONDENT AND APPELLEE.

COUNTER-STATEMENT OF FACT.

Delphi Frosted Foods Corporation sued the Illinois Central Railroad Company, as initial carrier, claiming that it was liable for alleged damage to six (6) cars of frozen fruit, consisting of strawberries, dewberries, blackberries and peaches, shipped from Paducah, Kentucky, during the month of July, 1945. Five (5) of the cars were consigned to Jersey City, and one to New Orleans. The action was brought under the Carmack Amendment. The bills of lading required that written claims be filed with the carrier within nine (9) months

after delivery of the property. As to four (4) of the six (6) cars, the Illinois Central claimed that the giving of the notice required by the provisions of the bill of lading had neither been plead nor proven. Persons who had contracted for some portions of each shipment, title to which never passed to them, made claims against the Erie Railroad Company. Delphi contended that the claims asserted against the Erie by these purchasers was a sufficient compliance with the notice provision of the bill of lading. The District Court held that the notice contemplated by the bill of lading should be given by the claimant and not by others, and that the claim for damages by persons who had contracted for some portion of the goods was not a compliance.

The District Court also held that Delphi Frosted Foods Corporation failed to show that the shipments were delivered to the Illinois Central Railroad Company in good condition. All of its evidence was general. There was no specific testimony as to the processing or freezing of any particular fruit in any particular car. It was shown by the railroad company on the other hand that the manager of the processing plant had stated that there was a break-down of the refrigerating plant in July; that there was no protection by canvas tunnel of the processed fruit as it was carried through the sun on the loading platform, and that no canvas covers were used over the doors of the cars while they were being packed. It was shown that in the two (2) cars in question, the peaches were discolored but the berries were in good condition. Experts who testified stated that the fact that only parts of the shipments

were in bad order indicated that there had been defective processing or loading. It was shown that maggots were found by the Government inspectors in some of the berry shipments. This indicated, according to the proof, that the shipments were damaged by flies and maggots before they were processed. It was shown that slip cover tops of the cans of the peaches were not airtight, and that when the cars are not properly braced such tops are apt to come off. The shipments were made "shippers load and count." The cars were in the hands of the shipper for several days before they were turned over to the railroad. Instructions of the shipper as to the quantity of ice and salt and the frequency with which the cars were to be iced were complied with. In the opinion of three (3) well qualified experts, the loss was due to the improper processing of the fruit. The District Court heard the testimony of witnesses on every essential point, and found that the appellant did not sustain its burden.

I.

PETITION FOR CERTIORARI FILED AUGUST 1, 1951—NOT IN TIME.

This case was decided by the United States Court of Appeals of the Sixth Circuit, April 10, 1951. The date appears in the official reports, 188 F. 2d 343. We file with our brief a certified copy of the order of the United States Court of Appeals, which is as follows:

"UNITED STATES CIRCUIT COURT OF APPEALS
For the Sixth Circuit.

No. 11,193.

DELPHI FROSTED FOODS CORPORATION, - *Appellant,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellee.*

Before SIMONS, ALLEN and MCALLISTER,
Circuit Judges.

Appeal from the District Court of the United States for the Western District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

(Signed) Florence E. Allen,
U. S. Circuit Judge.

Filed and entered
April 10, 1951.

A true copy

Attest: J. W. Menzies,
Clerk, U. S. Court of Appeals
For the Sixth Circuit,
By: Carl W. Reuss,
Chief Deputy Clerk."

It will be noted that the judgment was signed and entered April 10, 1951. It appears, therefore, that the time for filing application for certiorari expired July 10, 1951. *Supreme Court Rule 38 (page 31). Act of February 13, 1945 (page 7 of appendix to Supreme Court Rules).* The petition for certiorari was filed August 1, 1951, twenty-two (22) days after the expiration of the time. In the petition, the attorney for the petitioner states:

> "The petitioner appealed to the United States Court of Appeals, Sixth Circuit, where the judgment was unanimously affirmed by judgment of affirmance entered May 3, 1951."

The above statement appears to be misleading. Undoubtedly the three (3) months period referred to in the Act of February 13, 1925, Section 8, began to run on April 10, 1951. The Act provides:

> "That no writ of error, appeal or writ of certiorari intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained, unless application therefor be duly made within three (3) months after the entry of such judgment or decree * * *."

The judgment or decree referred to is obviously that of the Court from which the appeal is taken. May 3, 1951, is the date of the mandate issued by the Clerk of the Court. The following is quoted from Federal Appellate Practice by Carl W. Ruess, Chief Deputy Clerk of the United States Court of Appeals, for the Sixth Circuit, a work which we have found accurate:

"PETITION FOR CERTIORARI NOT AFFECTED BY ISSUANCE OF MANDATE. The fact that the mandate of the appellate court has been issued to the trial court does not affect the right of a party to apply for a writ of certiorari, nor does it affect the power of the Supreme Court to grant the writ. On the other hand, the filing of a petition for writ of certiorari does not, of itself, operate to stay the issuance of the mandate. A formal written motion for stay of mandate must be filed, as indicated in the preceding section.

"BOND ON STAY OF MANDATE. It is not customary for the Court in the ordinary case to require additional bond as a condition precedent to a stay of the mandate."

Motion is frequently made to stay the mandate pending the filing of petition for writ of certiorari. Under Rule 30 of the Sixth Circuit such motion must be made within twenty (20) days from the date of the court's decision, or within five (5) days after the denial of a petition for rehearing. No such motion was made in this case. The fact that it may be made indicates that our construction and that of the author of the above work is correct. This point would seem to dispose of the petitioner's application for certiorari. Under Rule 7, (3):

"No motion by respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the Court to grant writs of certiorari may be included in briefs in opposition to petitions therefor."

We understand from the above that our objections should be presented in this form, and not by motion. Since the rule makes it necessary for us to file brief in opposition to the petition, we will also state our position on the questions referred to by petitioner appellant.

II.

NO NOTICE GIVEN.

Paragraph 2 (b) of each of the bills of lading upon which the shipments were made, was in part as follows:

> "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine (9) months after delivery of the property * * * or in case of failure to make delivery then within nine (9) months after a reasonable time for delivery has elapsed; * * *"

This provision is permissible under Paragraph 11 of Section 20 of the Interstate Commerce Act. *Section 20 (11), Title 49, U. S. C. A.* When these provisions of the bills of lading were plead as to MDT Car No. 21740, Paragraph II of the Complaint; IC Car No. 54400, Paragraph III of the Complaint; IC Car No. 50187, Paragraph VII of the Complaint, the defendant plead in a reply that written claims for damage to the shipments in Cars MDT 21740, Paragraph II of the Complaint; IC Car No. 54400, Paragraph III of the Complaint, and IC Car No. 52065, Paragraph IV of the

Complaint, were made against the Erie. It does not plead that such written claims for damage were made by it, and the record shows that these claims were made by numerous other persons who claimed to have purchased certain parts of the contents of the cars from the plaintiff. In view of the fact that these claimants who purchased from Delphi purchased only parts of the shipments that the shipments were not damaged as a whole, but damaged only in part in several instances, and that the claims were defeated because it was held that title had never passed to these claimants, it seems clear that these claims made by third parties did not constitute notice.

Certain of Delphi's customers sued Delphi in the State Courts of the State of New York for a refund of amounts paid by them. The New York court held that title had not passed to the customers. The District Court and the Court of Appeals held that the notice was to be given by the claimant and not by others. While notice to the delivering carrier by the claimant would have been sufficient, the assertion of claims for damages by persons who had contracted to purchase some parts of the shipments was not sufficient. Title to the goods had not passed to these persons and they were not agents of the appellant petitioner. *Chespeake & Ohio Railroad Company* v. *Martin,* 283 U. S. 222, 51 S. Ct. 458; *Appalachian Electric Power Company* v. *Virginian Railway Company,* 126 W. Va. 626, 29 S. E. 2d 451; *Southern Pacific Co.* v. *Stewart,* 248 U. S. 446, 39 S. Ct. 139, 63 L. Ed. 350; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird, Admr.,* 243 U. S. 592, 37 S. Ct. 462,

61 L. Ed. 917; *Gooch* v. *Oregon Short Line Rd. Co.*, 258 U. S. 22, 42 S. Ct. 192, 66 L. Ed. 443; *American Ry. Express Co., Inc.*, v. *The Fashion Shop, Inc.*, 56 App. D. C. 114, 10 F. 2d 909; *Manby* v. *Union Pacific R. Co.*, 8 Cir., 10 F. 2d 327; *Insurance Co. of North America* v. *Newtowne Mfg. Co.*, 1 Cir., 187 F. 2d 675.

The pleading in Paragraph 5 of plaintiff's reply, Transcript pages 61 to 64, does not appear to meet the requirement that the giving of the notice must be plead. In the case of *L. & N. Railroad Company* v. *Home Fruit and Products Company*, 310 Ky. 269, 220 S. W. 558, it was held that the failure to allege that written notice of plaintiff's claim for damage was filed within nine (9) months was fatal, and that the petition failed to state a cause of action. See also, *L. & N. Railroad Company* v. *Patton*, 288 Ky. 450, 160 S. W. 2d 474. No circumstances were shown bringing actual or constructive notice to Illinois Central that claims would be made against it. It was, therefore, held that because of the failure to file such claims within the nine (9) months period, there could be no recovery for damage to the contents of the four (4) cars in question.

III.

APPELLANT'S PROOF INSUFFICIENT.

Title 49, Section 101, U. S. C. A., a part of what is sometimes known as the Bills of Lading Act, is in part as follows:

> *"Sec. 101. Loading by shipper; contents of bill; ascertainment of kind and quantity on request.*

When package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also by inserting in the bill of lading the words 'Shipper's weight, load, and count,' or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the non-receipt or by the misdescription of the goods described in the bill of lading."

See *Standard Hotel Supply Company* v. *Pennsylvania Railroad*, 65 Fed. Supp. 439, U. S. D. C., S. D., N. Y., in which the Tariff Rules No. 130, 135 and 35 are set out. In effect, the New York Court held in the above case that where the loading of perishable matter was done by shipper under a "shippers load and count" bill of lading, the obligation was placed on the shipper of seeing that the car was properly loaded, and

at a proper temperature; that the shipper was supposed to know the condition of his own commodity, and the requisite amount and period of pre-icing that the commodity required.

Rules No. 130 and No. 135, Perishable Freight Committee, Perishable Protective Tariff No. 13, are as follows:

"Rule No. 130:

"CONDITION OF PERISHABLE GOODS NOT GUARANTEED BY CARRIERS.—Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay in so far as may be accomplished by reasonable protective service of the kind and extent requested by the shipper, performed without negligence."

Rule No. 135:

"LIABILITY OF CARRIERS.—Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carriers is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived."

Respondent had no control over the cars while they stood for days at a time on the tracks of the shipper. IC Car No. 52116 remained on Craddock's track for three (3) days; IC car No. 55845 remained on Craddock's track for four (4) days (Tr. 542, 543). It had no information and was not required to have any information as to the processing or loading of the commodities shipped. It was required to simply perform its contract with reference to the icing of the cars, and to transport the cars within a reasonable time. Defendant contends that it established by uncontradicted evidence that it had performed this duty. The testimony of C. A. Richardson was supported by that of Fred S. Hobbs, representative of the Railroad Perishable Inspection Ageney, an independent association which inspected five (5) of the six (6) shipments involved. The witness, Hobbs, imputed the loss to improper processing before the fruit was frozen (T. R., pp. 663-664). See also stipulation as to IC Car No. 55845, pages 672, 763. He states that there was a general failure of peach shipments in 1945 due to oxidation and the failure to use ascorbic acid (Tr., p. 668).

It appears to us that the conclusion that the damage was done to these shipments before they were frozen finds support in the testimony of Roy S. Pruitt, and the Government inspectors, whose findings were placed in the record by him. Roy S. Pruitt is in charge of the St. Louis Office of the Pure Food and Drug Administration. He is the chief of the St. Louis District of the Food and Drug Administration, directing

the activities of chemists and inspectors in the enforcement of the law. His experience covers twenty (20) years (Tr. 479, 480). In some of the samples referred to maggots were found, an average of twenty-five (25) maggots per pound (Tr. 491). It is a matter of common knowledge that maggots are the product of the eggs of some type of fly (Tr. 508). Mr. Pruitt says they were vinegar flies. Certainly they would not leave or deposit their eggs in the cold temperatures of the freezer or the interior of a car. This condition and the fermentation must have taken place prior to the freezing of the fruit. Defendant is not required to know or show when it took place. The conditions found in samples from three (3) of the cars referred to by Pruitt must have originated when temperatures were high enough to cause fermentation and the damage done by flies. The cars were shipped from Paducah in July, 1945. Evidence for the petitioner that the doors of the cars were covered with a heavy cloth during the loading and that the loading platform was covered was contradicted by the positive statement of the witness, Jesse Flowers, who was frequently present during the period of loading; that no canvas tunnel was used to protect the fruit from the sun and that he saw no cover over the door (Tr. 598, 551). Caldwell, manager of petitioner's plant, told him the delay in loading was caused by a refrigerating plant break-down (Tr. 552). The same information as to a plant break-down appears in two (2) official reports from an inspector of the Food and Drug Administration (Tr., p. 485). Reports from the same Department

of the Government showed maggots in berries 25 to the pound (Tr., p. 491). In carload shipments, some fruit was found to be decomposed, and other fruit allegedly processed and handled in the same manner was found to be in good condition; for example, the damage to peaches in IC Car No. 50187 was limited to those in the 26-pound cans. Peaches in the 30-pound cans in that shipment were in good condition (Tr. 492). A shipment to the Mound City Cold Storage Company at St. Louis, not involved in this proceeding, but processed at the same plant in the same manner in July, 1945, was found to contain rotten, fermented, moulded berries (Tr. 500). The witness, Roy Pruitt, Chief of the St. Louis district of the Food and Drug Administration, was qualified as an expert in the course of his cross-examination. As to IC Car No. 50187, he expressed the opinion that that part of the shipment of peaches, which was in bad order, probably became bad before it was shipped (Tr. 502). In his opinion the maggots and fermentation in parts of the shipment were "* * * in there at the time the fruit was processed" (Tr. 517). The flies, from whose eggs maggots come, do not frequent a place under fifty (50) degrees temperature (Tr. 508). The witness, John J. Strangeway, Inspector for the Railroad Perishable Inspection Agency, introduced by the appellant, did not find any of the usual containers for dry ice in the cars inspected by him (Tr. 462). He found no bracing in any of the cars (Tr. 463). In his opinion, the slip-top cans, which were used exclusively for the shipments of peaches, would cause oxidation, and without bracing

the slip-tops would work off from the normal vibration of a train (Tr. 462, 463).

Appellee introduced a large number of witnesses, whose evidence was heard orally. Many witnesses who were available were permitted to leave under stipulations. More than forty (40) depositions were taken by appellee in several States. Appellee not only showed a complete record of the handling and icing of all of the cars, but introduced proof, not merely by records kept in the usual course of business, which would have been competent, but by the witnesses who made the records. By all of these witnesses it has been shown that the six (6) cars were handled in accordance with instructions, and handled within a reasonable time. The cars were iced in accordance with the requirements of the bill of lading on which they were shipped. With these proven facts as a background, the witnesses, C. A. Richardson, Fred S. Hobbs and Roy S. Pruitt, expressed the opinion that the damage to the fruit was caused by improper processing and loading before the transportation began.

It is thus shown by the preponderance of the evidence that the fruit was necessarily in bad condition before loading. We have pointed out that the evidence shows that the appellee and connecting carriers did their full duty under the tariff provisions and the bill of lading. This of itself tends to prove either that the fruit was in bad condition when loaded, or that the shipper's instructions, which were carried out, were inadequate. Certainly this evidence was sufficient to support the Court's conclusion that appellant had not sustained the burden.

IV.

EFFECT OF CONTRACT.

Petitioner appellant relies upon the rule that evidence of delivery of shipment to a carrier in good condition and delivery by a carrier in bad condition makes out a *prima facie* case of negligence. The rule was recognized by the courts below. It is not available to petitioner, as pointed out above, because it did not make out a *prima facie* case. It is not helpful to petitioner for the further reason that its contention ignores the provisions of the bill of lading and the tariff provisions quoted above. The bill of lading provided that the fruit was to be transported "shippers load and count." The carrier was not responsible for improper loading and was under no obligation to see that the car was properly loaded, or loaded at a temperature low enough to protect the frozen fruit.

South Carolina Asparagus Growers Association v. Southern Railway Company, 4th Cir., 46 F. 2d 452;

Standard Hotel Supply Company v. Pennsylvania Railroad Company, 65 F. Supp. 439.

The carrier's instructions given by the shipper were a part of the contract. It was required to give standard refrigeration, thirty percent (30%) salt and seventy percent (70%) ice. The respondent appellee showed without dispute that from the time of shipment to the time of arrival it gave protective service to these cars, as required by the tariff and bill of lading. Experts

whose qualifications were shown, testified that the cars were transported within a reasonable time (Tr. 531, 535, 536, 633, 636, 637, 638). Respondent also showed the history and condition of the cars (Tr. 567, 568). The lower courts held that this evidence was a sufficient showing of compliance with its contractual obligation and that it tended to exclude any possibility of liability for negligence.

Chespeake & Ohio Railroad Company v. A. F. Thompson Manufacturing Company, 270 U. S. 416, 46 S. Ct. 318, 79 L. Ed. 659.

It was held that the failure of the plaintiff to establish delivery of the shipment in good condition and the positive showing that the carrier had given protective service as required by its contract, required a judgment for the respondent.

RELIEF.

It is respectfully urged that the petition for certiorari should be dismissed:

1. Because it was not filed in time.
2. The judgments of the District Court and the United States Court of Appeals should be affirmed:
   (a) Because the proof shows without dispute that as to four (4) of the cars, the giving of notice as required by the bill of lading was neither plead nor proven;
   (b) As to the remaining cars (or all of them) petitioner did not prove the delivery of the

frozen fruit to the railroad in good condition, the proof showing rather that the food was improperly processed and loaded, and

(c) The evidence established the fact that the railroad gave proper protective service as required by the tariff and bill of lading.

Respectfully submitted,

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